

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 165 of 1991

with

CRIMINAL APPEAL No 143 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

---1 to 5 : No

MOHAN KHODA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 165 of 1991
MR IM PANDYA for the appellants
Mr.S.R.Divetia, LAPP for Respondent No. 1
2. Criminal Appeal No 143 of 1991
Mr.S.R.Divetia, LAPP for the appellants
MR PM VYAS for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and

ORAL JUDGEMENT (N.J.Pandya,J.)

The record shows that, of the aforesaid 3 appeals and one M.C.A., Cr.A.No.147 of 1991 is disposed of on 13-6-1991. The present order is, therefore, in respect of the remaining matters.

2. The incident leading to the present appeal occurred on 29-7-1987 between 10.30 AM and 11.00 AM in the market area of Jesar village, Savarkundla Taluka, District Bhavnagar. The case of the prosecution is that, as many as 15 persons had formed an unlawful assembly and had attacked on the prosecution witnesses with fatal consequences for Jayantilal Kurjibhai and Vinubhai Kurjibhai, two brothers, and injury to one of the eye-witnesses Maganbhai Popatbhai. Tension was created between the prosecution witness, on one side and the accused on the other, for quite some time and on the day of the incident itself, at about 9.00 AM, accused no.1 had tried to chase son of the deceased Jayantibhai, when he was in the market for purchasing vegetables. On coming to know about this, Jayanti, the deceased and his brothers decided to inform the police which they did by 10' o clock.

3. However, before that, by 9.00 AM, accused no.1 has also informed the police at Jesar that he apprehends breach of peace at the hands of the prosecution witnesses and he accordingly lodged a report. Both these reports were handed over by PSI Mr.Laxmansinh Parmar to his Head Constable for investigation and further action, if necessary.

4. Coming to the incident itself, Jayanti was coming back to his job in what is known as "Nicha Bazar" area of the said town and he was about to come at the place where his shop is situated. Opposite to that shop, or near about it, is a stone platform with a temple referred to as "mataji-no-otto. The accused party was sitting there. On seeing Jayanti, who was followed by his younger brother Vinu, another deceased, at a distance, the accused party said to have got up from the said platform and surrounded Jayanti. In this melee, accused no.1 gave a knife blow in the abdominal region of the deceased, accused no.2 gave a knife blow in the scapular region of the deceased and weapons like stones were also used resulting in 12 to 14 injuries to said Jayanti.

5. Vinu was given fatal blow by Babu Ghusa, original accused no.11, appellant no.6 and there is only one injury on his person. The injured eye witness Maganbhai Popatlal tried to intervene and he received injuries with weapons like sticks and pipes. Of the total number of accused, one accused i.e. accused no.14 Shamji Sata died during the pendency of the appeal in jail. He too had received injuries on his forehead, which were of serious nature, as it had caused fracture of frontal bone, but luckily he survived. It is the case of the defence that he received injury in the course of this very incident itself. The story of the defence is that he was beaten by said deceased Jayanti with a pipe.

6. Elaborate trial took place. Several witnesses were examined and at the end of the trial, out of 15 accused, 7 came to be convicted and 8 were acquitted. For the acquitted accused, State has filed appeal No.143 of 1991 and the convicted accused have filed appeal No.165 of 1991. As appellant no.7 Shamji Satta has expired during the pendency, the appeal would survive for the remaining 6 accused.

7. The complaint is filed by Nagarbhai Kurjibhai, Exh.86, p.w.6, page 542 of the paper book. He is the brother of the deceased. He came on the scene when the incident was in progress, ifnot completed altogether. He saw injuries being inflicted on both his brother with fatal consequences.

8. One peculiar feature of the case is that right from the complaint, all through out, no specific role is assigned to the remaining accused, but accused nos.1,2 & 11, without any manner of doubt, have been implicated right from the beginning. In a very general nature, role is said to have been played by the remaining accused. However, in the course of trial, all the witnesses have tried to be specific and have graphically described the incident in respect of each of the accused. The consequence has been, 8 of the 15 accused have been acquitted by the learned Additional Sessions Judge, Bhavnagar in Sessions Case No.122 of 1987, by his judgment dated 16-1-1991.

9. Holding accused nos.1,2 & 6 guilty for offence under Sec.302, the remaining accused-appellants came to be convicted with the aid of Sec.149 IPC. There is definite charge of unlawful assembly, but, that has been brought about, almost at the end of the trial at the request of the prosecution, after virtually, the evidence was over. Neither the prosecution, nor the defence has

thereafter chosen to lead additional evidence or to recall witnesses for cross-examination with regard to said additional charge. In other words, they have proceeded on the basis that the charge under Sec.149 was there right from the beginning and they have no additional material to be brought on record with regard to this newly added charge. They have passed appropriate pursis in this regard and therefore, there is no question of any prejudice having been caused on account of absence of charge under Sec.149 from the beginning and its subsequent addition to the charge almost at the end of the trial.

10. In our opinion, with regard to Sec.149 read with Sec.145, there is hardly any evidence. Unlawful assembly it is difficult to make out. Mere presence of 5 or more persons automatically would not turn it into an unlawful assembly. The prosecution has to plead and prove the specific object of the assembly, then only, it would become an unlawful assembly.

11. In the aforesaid background, if at all there was any enmity, it was between accused no.1 and deceased Jayanti and at best, the enmity may extend to their respective family. However, on the date of the incident, except for the earlier occasion, involvement of son of Jayanti, one Narendra, nothing had happened. Prior to that, at about 3 months back some quarrel had taken place and therefore, there might be some sort of enmity simmering between the two groups. Except for the incident of Narendra, the sudden explosion of this violent activity resulting into 2 fatalities, remains a enigma which is not tried to be solved by the prosecution. Prosecution may be helpless, in the sense that the witnesses upon whom they rely, have carefully tried to shy away from the injuries received by Shamji, the deceased accused, original accused no.7, as the said PSI Parmar confirms having recorded the complaint given by Shamji with regard to the injury that he had received specifically naming the accused therein. Needless to say, they belong to the prosecution side.

12. In this background, in absence of invocation of Sec.149, conviction of the appellants 3,4 & 5 could not be sustained. This takes us to the conviction as to the remaining accused. They are all have been convicted for offence under Sec.302 read with Sec.149 of I.P.C. It may be clarified here that in the elaborate charge that was framed, there was an alternative charge against these accused making them to answer the charge under Sec.302 individually. The question, therefore, put before us by

the learned Advocate Mr. A.D.Shah on behalf of these accused-appellants was whether their conviction under Sec.302 could be maintained or, it can be altered into one under Sec.304. He had further submitted that it can be altered into 304 part II.

13. Witness Maganbhai Popatbhai, the injured and the complainant Nagarkar as well as other eye witnesses did create a impression when their testimony is read that the quarrel was in the nature of a free fight. No doubt, both the sides were apprehending some untoward activity from the other and therefore, the request for maintenance of peace and apprehension of breach of peace made in form of their respective complaints to the police station at Jesar. However, to infer that death was intended to, in our opinion, would be too hazardous an inference. There is hardly any maerial on record indicating that death on either side was intended. So far as the prosecution witnesses are concerned, no doubt, they have lost two lives namely Jayanti and Vinu. Their dying declarations came to be recorded at Exhs.,71 and 73, which in keeping with the overeall prosecution case, in form of a complaint and police statement are of a general nature except for the present accused. The material that comes on record is that fatal blow was given. No doubt, the blow has landed on vital organ in both the cases. The blow is in the abdominal region. This caused injury to the line of stomach leading to profuse bleeding and eventually death.

14. Yet, the fact remains that only one blow has been given in respect of both the deceased. In absence of any other material record and taking the overall view of the tenseness prevailing between the two groups, it is not possible to hold that death was intended. Otherwise also, exception 4 to Sec.300 which refers to sudden quarrel where the assailants have not taken advantage, nor have they acted in a cruel manner would make it a offence of culpable homicide not amounting to murder. Precisely, Mr.Shah has drawn our attention to this exception and we accept his submission.

15. Coming back to the submission of the incident falling under Sec.304 Part II, we do not agree with L.A. Mr.Shah. In the aforesaid circumstances we hold that it is a case falling under Sec.304 part I. This will apply to accused-appellant no.1, accused-appellant no.6 respectively Mohan Khoda and Babu Ghusa. So far as accusedno.2 is concerned, he has given a knife blow in the scapular region of deceased Jayanti.This, at best, would result into conviction under Sec.324 IPC. We hold

accordingly.

16. In the result, appeal No.165 of 1991 is allowed in respect of appellants no.3,4 & 5 i.e. Budha Shamji, Diwaliben Khodabhai & Ghela Jadav. Appellants No.3 & 5 are ordered to be set at liberty forthwith, if not required for any other purpose. Bail bond of accused no.4 shall stand cancelled.

16.1 Conviction of accused-appellants no.1 & 6 i.e. Mohan Khoda and Babu Ghusa is converted to one under Sec.304 Part I and their conviction undere Sec.302 is set aside. So far as the sentence is concerned, they are ordered to undergo 10 years R.I. in place of life imprisonment imposed by the trial Court.

16.2 So far as appellant no.2,Gordhan Jasa, is concerned, his conviction is altered to one under Sec.324 IPC. As he has undergone more sentences than he could have been awarded under ordinary circumstances, he is ordered to be set at liberty forthwith, if not required for any other purpose.

16.3 Appellant no.7 died during the pendency of the appeal, and hence, his appeal has abated.

16.4 Criminal Appeal No.143 of 1991 filed by the State is dismissed.
